### **DOCKET FILE COPY ORIGINAL**

NATHANIEL HAWTHORNE

Attorney at Law/Consultant

Admitted in Ohio, Illinois and the District of Columbia

www.telecomlawyer.com email: nateh@oh.verio.com

27600 Chagrin Boulevard Suite 260

> Cleveland, OH 44122 (216) 514-3336

fax (216) 514-3337

Express Mail

February 9, 2001

RECEIVED

FEB 1 2 2001

Ms. Magalie Roman Salas Secretary Office of the Secretary

FCC MAIL ROOM

01-42/

And

Peggy Green, Esq. Cable Services Federal Communications Commission 445 –12th Street, S.W., Rm TW-204B Washington, D.C. 20554 FEB 1 2 2001

Re: City Signal Communications, Inc. v. The City of Eastlake

Enclosed is the original and 15 copies of a Petition for filing in the above case. There is an extra copy. Please time stamp the extra copy and return it to me in the enclosed stamped, self addressed envelope.

Upon receipt of this Petition, please deliver the original to Peggy Green.

Please place the petition on the accelerated docket.

Sincerely,

Nathaniel Hawthorne

Cc: Charles Koslosky, City Signal Communications

# Before the FEDERAL COMMUNICATIONS COMMISSION WASHINGTON, DC 20554 RECEIVED

In the matter of

FEB 1 2 2001

CS PK FCC MAIL ROOM

City Signal Communications, Inc. 19668 Progress Drive Strongsville, Oh 44136

Place on Accelerated Docket

Petitioner,

v.

Dan DiLiberto, Mayor The City of Eastlake 35150 Lakeshore Boulevard Eastlake, Ohio 44097

Defendant.

FEB 1 2 2001

### Petition

Note: This Petition was originally mailed to the FCC by Counsel on behalf of City Signal Communications on October 2, 2000; It was time stamped by the FCC on October 10, 2000. However, since the original filing was misplaced, I was advised by Peggy Green of the FCC to refile the Petition.

To: The Commission.

The petitioner shows that:

- 1. City Signal Communications, Inc. (City Signal) is a telecommunications company (CLEC) under the laws and regulations of the State of Ohio.
- 2. Since certification as a telecommunications provider by the Public Utilities Commission of Ohio, City Signal has secured appropriate utility pole permits and rights of way authorization, and is in the process of installing its fiber optic network through various municipalities in Northeast Ohio.

- 3. The City of Eastlake is an Ohio municipality.
- 4. The City of Eastlake has refused to grant City Signal Communications authorization to use the public right of way to string fiber optic cable for telecommunications purposes.
- 5. During discussions with the City of Eastlake to obtain rights of way authorization, the Mayor of Eastlake, Dan DiLiberto, stated on two separate occasions that a right of way authorization would not be granted until City Signal Communications paid a franchise fee to the City of Eastlake. See Exhibit A (Affidavits).
- 6. No other telecommunications provider pays the City of Eastlake a franchise fee.
- 7. The denial of a permit to string fiber optic cable for telecommunications purposes has the effect of denying telecommunications services to the residents and business subscribers in the City of Eastlake and surrounding areas. Such action would force City Signal Communications to find an alternate route at increased cost which would make City Signal's service non-competitive.
- 8. The demand for payment of a franchise fee for a right of way permit requested by a telephone company is in violation of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"). Telecommunications Act of 1996, 47 U.S.C. 151, et seq.
- 9. The Act expressly and directly addresses local government regulation of telecommunications company use of the right-of-way.
- 10. Section 253 of the Act (47 USC § 253) provides: "No ...local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of

prohibiting the ability of any entity or provide any interstate or intrastate telecommunications service.

- 11. By demanding a franchise fee, the City of Eastlake's action has the effect of prohibiting City Signal from providing interstate or intrastate telecommunications service.
  - 12. The City of Eastlake's compensation scheme:
    - (1) did not impose its franchise fee on a competitively neutral and nondiscriminatory basis;
    - (2) did not publicly disclose the fee; and,
    - (3) does not apply the fee to other telecommunication providers.
- 13. No other governmental entity in Ohio has adopted a position wherein a franchise fee is demanded in exchange for a permit to install telecommunications facilities.
- 14. Specifically, Ohio House Bill 283, passed in late 1999 and codified at Chapter 4939 of the Ohio Revised Code, generally spells out the scope of a municipality's authority to regulate utility service provider and cable operator use of the public right-of-way.
  - 15. Among other things, House Bill 283 provides:
  - That a utility service provider, such as natural gas, telephone and electric companies or cable operator has the right to construct, repair, position, maintain, or operate lines, poles, pipes, conduits, ducts, equipment, and related appurtenances and facilities along, across, over, upon, and under any public way in the state.
  - That utility service providers and/or cable operator may be required to obtain the consent of political subdivisions for construction, as opposed to operation,

maintenance and repair of existing facilities, of lines, poles, pipes, conduits, ducts, equipment, and related appurtenances and facilities along, across, upon, and under any public way owned by a political subdivision.

 That political subdivisions of the state may not levy a tax, fee, or charge or require any non-monetary compensation for free service for the right or privilege of using or occupying a public way for purposes of delivering natural gas, electric, telecommunications, or cable television service.

16. The City of Eastlake's demand for a franchise fee in order for City Signal Communications, Inc. to us the public right of way to install telecommunications facilities is in violation of the Orders of this Commission's Congressional mandate to introduce competition into the local telecommunications markets to make competitive alternatives available to individual/business subscribers. See, FCC99-141, CC docket No. 96-98 (WT Docket No. 99-217), Released June 7, 1999. See also, TCI Cablevision of Oakland County, Inc., CSR-4790, Released September 19, 1997.

Wherefore, petitioner asks that the FCC preempt the enforcement of any pronouncement, rule, regulation, or ordinance by the City of Eastlake that prohibits or may have the effect of prohibiting the ability of City Signal Communications, Inc. from providing interstate or intrastate telecommunications service in or through the City of Eastlake, and grant an order that a permit be granted to construct fiber optic facilities in the City of Eastlake.

Date

Nathaniel Hawthorne

Nathaniel Hawthorne, Attorney Member DC Bar # 237693 27600 Chagrin Blvd.

Cleveland, Ohio 44122

(216) 514-3336

### **Affidavit**

State of Ohio SS.

I, William Park, being first duly sworn, depose and say the

## Following is true:

- I attended two meetings at the City of Eastlake City Hall on March 1. 23, 2000 and June 29, 2000;
- 2. The purpose of the meetings was to secure a right of way permit for the installation of fiber optic cable by City Signal Communications, Inc. through the City of Eastlake;
- 3. The Mayor of Eastlake, Dan DiLiberto, was present at both meetings; and,
- 4. Dan DiLiberto stated that City Signal Communications, Inc. would not receive a permit for the installation of fiber optic cable in the City of Eastlake unless a franchise fee of 5% of revenue was paid.

Further affiant sayeth naught.

WWW KILL William Park

Sworn to and subscribed before me this 25 day of September, 2000.

My Commission Expires: \_\_\_\_\_DIANE L\_HERZOG, Notary

Residence Co. - Cuyahoga State of Ohio

My Commission Exp. Feb. 2, 2002

### **Affidavit**

State of Ohio	)
	) ss
	)

I, Charles Koslosky, being first duly sworn, depose and say the

### Following is true:

- 1. I attended two meetings at the City of Eastlake City Hall on March 23, 2000 and June 29, 2000;
- 2. The purpose of the meetings was to secure a right of way permit for the installation of fiber optic cable by City Signal Communications, Inc. through the City of Eastlake;
- 3. The Mayor of Eastlake, Dan DiLiberto, was present at both meetings; and,
- 4. Dan DiLiberto stated that City Signal Communications, Inc. would not receive a permit for the installation of fiber optic cable in the City of Eastlake unless a franchise fee of 5% of revenue was paid.

Further affiant sayeth naught.

Charles Koslosky

Sworn to and subscribed before me this  $36^{th}$  day of September, 2000.

Notáry Public

My Commission Expires:

JOAN A. GALLOWITZ, Notary

Residence Co. - Cuyahoga State of Ohio

My Commission Exp. July 1, 2004

## **Affidavit**

State of Ohio ) ) s:

I, Martin Jarret, being first duly sworn, depose and say the

# Following is true:

- 1. I attended two meetings at the City of Eastlake City Hall on March 23, 2000 and June 29, 2000;
- 2. The purpose of the meetings was to secure a right of way permit for the installation of fiber optic cable by City Signal Communications, Inc. through the City of Eastlake;
- 3. The Mayor of Eastlake, Dan DiLiberto, was present at both meetings; and,
- 4. Dan DiLiberto stated that City Signal Communications, Inc. would not receive a permit for the installation of fiber optic cable in the City of Eastlake unless a franchise fee of 5% of revenue was paid.

Further affiant sayeth naught.

Martin Jarret

Sworn to and subscribed before me this 24 day of var

Notary-Public

My Commission Expires: Klash warters att

(216) 514-3337

email: Nateh@oh.verio.com

for City Signal Communications, Inc.

Certificate of Service

A copy of this petition was served upon:

Mayor Dan DiLiberto The City of Eastlake 35150 Lakeshore Boulevard Eastlake, Ohio 44097

by Certified US Mail, Return Receipt Requested # 7000 0520 0015 5440 4861 , this 2nd day of October, 2000.

Nathaniel Hawthorne

A copy of this refiled petition was served upon:

Mayor Dan DiLiberto The City of Eastlake 35150 Lakeshore Boulevard Eastlake, Ohio 44097

by regular US Mail, postage prepaid, this 9th day of February, 2001.

Nathaniel Hawthorne